

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KENNETH JAMES WEST,

Petitioner,

v.

RAUL MORALES,

Respondent.

Case No. 1:22-cv-00172-KES-CDB (HC)

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS AND DISMISSING IN  
PART PETITIONER'S SECOND AMENDED  
PETITION

(Doc. 39)

Petitioner Kenneth James West is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. Petitioner filed the initial petition on February 7, 2022. *Id.* On February 23, 2022, the assigned magistrate judge completed a screening of the petition. Doc. 12. The assigned magistrate judge found the petition failed to state a claim and directed Petitioner to file a first amended petition. *Id.*

Petitioner filed a first amended petition on March 15, 2022. Doc. 14. On July 22, 2022, Respondent filed a motion to dismiss the petition, and petitioner filed a response on August 11, 2022. Docs. 19, 22. The assigned magistrate judge issued findings and recommendations that respondent's motion to dismiss be granted, that the first amended petition be dismissed without prejudice, and that Petitioner be provided an opportunity to file a second amended petition. Doc. 27. Petitioner filed

1 objections to the findings and recommendations on December 19, 2022. Doc. 28. The Court adopted  
2 the assigned magistrate judge's findings and recommendations on March 7, 2023. Doc. 29.

3 On March 31, 2023, petitioner filed a motion to stay this federal habeas proceeding to permit  
4 him to raise his unexhausted claims in state court. Doc. 30. The assigned magistrate judge issued  
5 findings and recommendations to grant petitioner's motion for stay. Doc 31. On June 30, 2023, the  
6 Court adopted the assigned magistrate judge's findings and recommendations. Doc. 33.

7 On March 27, 2024, Petitioner filed the operative second amended petition. Doc. 38. On  
8 June 14, 2024, the assigned magistrate judge completed a screening of the second amended petition.  
9 Doc. 39. The assigned magistrate judge found petitioner appeared to have stated a cognizable claim  
10 for ineffective assistance of counsel in violation of the Sixth Amendment. Doc. 39 at 8. The  
11 magistrate judge noted petitioner had failed to state cognizable claims under the Eighth and Fourteenth  
12 Amendments and recommended dismissal of those claims. *Id.* at 9-13. The findings and  
13 recommendations advised petitioner that he must file any objections within 30 days after service of the  
14 order and that the "[f]ailure to file objections within the specified time may result in the waiver of  
15 rights on appeal." *Id.* (citations omitted). Petitioner did not file objections or any other response to  
16 the findings and recommendations, and the deadline to do so has expired.

17 Pursuant to 28 U.S.C. § 636(b)(1), this Court conducted a de novo review of this case. Having  
18 carefully reviewed the entire matter, this Court concludes the findings and recommendations are  
19 supported by the record and by proper analysis.

20 Having found that petitioner is not entitled to habeas relief on his Eighth and Fourteenth  
21 Amendment claims, the Court now turns to whether a certificate of appealability should issue. A  
22 petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial  
23 of his petition, and an appeal is allowed only in certain circumstances. *Miller-El v. Cockrell*, 537 U.S.  
24 322, 335-336 (2003). If a court denies a habeas petition on the merits, the court may issue a certificate  
25 of appealability only "if jurists of reason could disagree with the district court's resolution of [the  
26 petitioner's] constitutional claims or that jurists could conclude the issues presented are adequate to  
27 deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S.  
28 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must

1 demonstrate “something more than the absence of frivolity or the existence of mere good faith on his .  
2 . . part.” *Miller-El*, 537 U.S. at 338.

3 In the present case, the Court finds that reasonable jurists would not find the Court’s  
4 determination that the Eighth and Fourteenth Amendment claims should be dismissed debatable,  
5 wrong, or deserving of encouragement to proceed further. Petitioner has not made the required  
6 substantial showing of the denial of a constitutional right. Therefore, the Court declines to issue a  
7 certificate of appealability.

8 Accordingly, the Court HEREBY ORDERS:

- 9 1. The June 14, 2024, findings and recommendations, Doc. 39, are adopted in full;
- 10 2. Petitioner’s Fourteenth Amendment claim is DISMISSED WITH PREJUDICE;
- 11 3. Petitioner’s Eighth Amendment claim is DISMISSED WITH PREJUDICE;
- 12 4. Respondent SHALL file a response<sup>1</sup> to petitioner’s claim for ineffective assistance of  
13 counsel within SIXTY DAYS of the date of service of this order. *See* Rule 4, Rules  
14 Governing Section 2254 Cases; *Cluchette v. Rushen*, 770 F.2d 1469, 1473-1474 (9th Cir.  
15 1985) (court has discretion to fix time for filing a response). A response can be made by  
16 filing one of the following:

- 17 A. An answer addressing the merits of the petition. Respondent SHALL include with  
18 the answer any and all transcripts or other documents necessary for the resolution  
19 of the issues presented in the petition. *See* Rule 5, Rules Governing Section 2254  
20 Cases. Any argument by respondent that petitioner has procedurally defaulted a  
21 claim SHALL be made in the answer but must also address the merits of the claim  
22 asserted.

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25 <sup>1</sup> Rule 4 of the Rules Governing Section 2254 Cases provides that upon the Court’s determination that  
26 summary dismissal is inappropriate, the Court “must order the respondent to file an answer, motion, or  
27 other response...or to take other action the judge may order.” Rule 4, Rules Governing Section 2254  
28 Cases; *see also* Advisory Committee Notes to Rules 4 and 5 of Rules Governing Section 2254 Cases  
(stating that a dismissal may obviate the need for filing an answer on the substantive merits of the  
petition and that the Attorney General may file a motion to dismiss for failure to exhaust); *White v.*  
*Lewis*, 874 F.2d 599, 602-603 (9th Cir. 1989) (providing that motions to dismiss pursuant to Rule 4  
are proper in a federal habeas proceeding).

1 B. A motion to dismiss the petition. A motion to dismiss SHALL include copies of  
2 all of petitioner's state court filings and dispositive rulings. *See* Rule 5, Rules  
3 Governing Section 2254 Cases.

- 4 5. If respondent files an answer to the petition, petitioner may file a traverse within THIRTY  
5 DAYS of the date respondent's answer is filed with the Court. If no traverse is filed, the  
6 petition and answer are deemed submitted at the expiration of the thirty days; and  
7 6. If respondent files a motion to dismiss, petitioner SHALL file an opposition or statement of  
8 non-opposition within TWENTY-ONE DAYS of the date respondent's motion is filed with  
9 the Court. If no opposition is filed, the motion to dismiss is deemed submitted at the  
10 expiration of the twenty-one days. Any reply to an opposition to the motion to dismiss  
11 SHALL be filed within SEVEN DAYS after the opposition is served.

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14 IT IS SO ORDERED.

15 Dated: December 19, 2024

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UNITED STATES DISTRICT JUDGE